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DEPARTMENT OF
WATER RESOURCES

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Consolidated Subcase Number: 92-23
	)	
	)	CITY OF POCATELLO'S STATEMENT
Case No. 39576	)	REGARDING THE STATE OF IDAHO'S MOTION
	)	FOR PARTIAL SUMMARY JUDGMENT
_____	)	

The State of Idaho's December 14, 2007 Motion for Partial Summary Judgment is based on Article 15, Section 3, of the Idaho Constitution, and Idaho Code Section 42-203B.

Specifically, the State seeks partial summary judgment that:

1. Legal title to any portion of the water right subject to the Swan Falls settlement for flows in excess of the minimum flows established at the Murphy Gauge under the State Water Plan is held in trust by the State of Idaho, by and through the Governor, for the benefit of Idaho Power Company and for the benefit of the People of the State of Idaho;
2. The water rights for power purposes held in trust by the State under Idaho Code Sec. 42-203B are subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to State law; and
3. The equitable doctrines of reformation, mutual mistake of fact, estoppel, waiver, and laches cannot be invoked or applied in a manner contrary to or inconsistent with Idaho Code Sec. 42-203B.

Pocatello supports the State's Motion for Partial Summary Judgment relating to the nature and extent of Idaho Power's subject hydropower claims. The City received the State's supporting memorandum and affidavits the afternoon of January 11, so reserves its right to

respond further, in accordance with the Court's December 20 Scheduling Order.

The City of Pocatello respectfully points out that the State's Motion for Partial Summary Judgment in 92-23 should not be understood to address the objections consolidated in Basin-Wide Issue 91-13. Consolidated Subcase 92-23 and BWI 91-13 may be overlapping and related, but only to the limited extent that Idaho Power's hydropower rights address only part of the protections that the Swan Falls Agreement accords to junior priority ground and surface water rights upstream in the drainage above Swan Falls Dam.

Statements in the July 23, 2007 SRBA Order for Consolidated Subcase 92-23 focus on these differences:

- "Simply incorporating by reference the *Swan Falls Agreement* into the partial decrees for the affected water rights or through a general provision as contemplated by Basin-Wide Issue 13, would leave unresolved a number of issues pertaining to the nature and extent of the subject hydropower claims." [P. 10, July 23 Order]
- "Issues exist over fundamental terms, which define the nature, scope and extent of Idaho Power's hydropower rights and should be decided in the SRBA." [P. 12, July 23 Order]¹

The City of Pocatello advised the SRBA court [in the City's motion for designation of what became BWI 91-13] that the Swan Falls issues include both a "general reference" issue (to ensure that no water right in the watershed above the Idaho Power Swan Falls Plant inadvertently loses the benefit of the Swan Falls Agreement because of the omission of appropriate reference to the Swan Falls Agreement in the SRBA court judgment or decrees) and the "discrete provision" issue (the possible need to incorporate discrete provisions of the Swan Falls Agreement into the decrees for Idaho Power's hydropower water rights within the Swan Falls drainage).

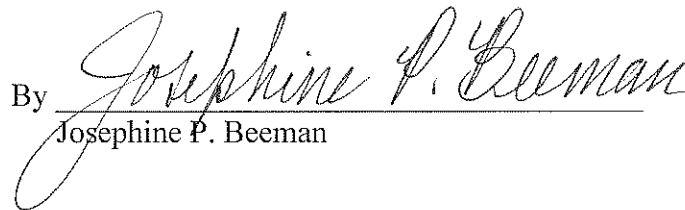
¹ This statement follows Judge Melanson's discussion regarding BWI 91-13 and Consolidated Subcase 92-23. Specifically, Judge Melanson distinguishes administration or enforcement of the Swan Falls Agreement (addressed in BWI 91-13) and fundamental terms of the Swan Falls Agreement which "define the nature, scope and extent of Idaho Power's hydropower rights" [Con. Subcase 92-23].

The general provision issue identified in BWI 91-13 applies to certain classes of water users who are third-party beneficiaries of the Swan Falls Agreement. These third-party beneficiaries are more specifically described in Pocatello's Opening Brief in Support of Motion to Designate Basin-Wide Issue and Stay Proceedings, at pp. 2-7 (July 9, 2004).

BWI 91-13 addresses the protection to third-party beneficiaries under the Swan Falls Agreement. This is an issue separate from the definition of Idaho Power's hydropower rights under the Swan Falls Agreement, now being addressed in 92-23.

DATED this 11th day of January 2008.

BEEMAN & ASSOCIATES, P.C.
Attorneys for the City of Pocatello

By 
Josephine P. Beeman

CERTIFICATE OF SERVICE

I certify that on this 11th day of January 2008, I caused to be served a true and correct copy of the foregoing document to the following parties by U.S. Mail:

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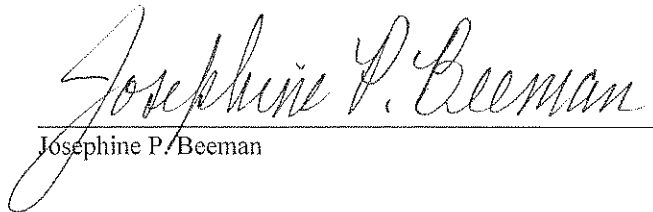
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